On September 16, 2002, the district court invoking the Prison Litigation Reform Act sua sponte entered an order dismissing the complaint on the grounds the complaint was frivolous because the defendants were entitled to immunity from suit for money damages. And because, Petitioner could not maintain a cause of action for the tort of malicious prosecution until he succeeded in having his conviction vacated. [Appendix A] The Eleventh Circuit affirmed the district court's judgment in an unpublished opinion issued on May 13, 2003. [Appendix B]. And a petition for rehearing was also denied on August 14, 2003. [Appendix C]. A petition for writ of certiorari was brought into this Court. However, the petition was returned to the Petitioner unfiled, because, it was not filed in a timely manner.

On December 13, 2003, Petitioner moved the district court under Fed.R.Civ.P. 60(b) to vacate part of the judgment entered on September 16, 2002. And requested that the complaint be reinstated against Judge Bauer and the Unknown John and Jane Doe Employees of the Clerk's Office of the U.S. Court of Appeals for the Seventh Circuit in light of this Court's holding pronounced in: **Nguyen v. United States**, 156 L.Ed.2d 64, decided on June 9, 2003. On January 12, 2004, the district court entered an order denying the Rule 60(b) motion. [Appendix D]. The 11th Circuit affirmed the district court judge's decision in an unpublished opinion issued on December 16, 2004. [Appendix E]. On May 3, 2005, an order was entered that denied a petition for rehearing. [Appendix F].

REASONS FOR GRANTING CERTIORARI

1.

The Eleventh Circuit ruling that Senior Circuit Court Judge William J. Bauer is entitled to absolute judicial immunity for his actions in violating Rule 27(c), of the Federal Rules of Appellate Procedure when he entered a one-judge order dismissing Petitioner's direct criminal appeal is inconsistent with this Court's prior holdings in Mirales v. Waco, 502 U.S. 9, 116 L.Ed.2d 9 (1991), and Nguyen v. United States, 539 U.S. 69, 156 L.Ed. 2d 64 (2003).

Rule 27(c) of the Federal Rules of Appellate Procedure states as follows:

> **"(c) Power of a Single Judge to Entertain a Motion.** A circuit court judge may act alone on any motion, but may not dismiss or otherwise decide an appeal or other proceeding. A court of appeals may provide by rule or by order in a particular .case that only the court may act on any motion or class of motions. The court may review the action of a single judge."

Additionally, the last paragraph to the 1967 Advisory Notes to Rule 27(c) of the Federal Rules of Appellate Procedure states:

> "A court of appeals may by order or rule abridge the power of a single judge it is of the view that a motion or a class of motions should be disposed of by a panel. Exercise of any power

> granted a single judge is discretionary with the judge. The final sentence in this subdivision makes the disposition of any matter by a single judge subject to review by the court."

Therefore, it is perfectly clear from the language contained in Rule 27(c), that Congress intended to prohibit a single circuit court judge from dismissing or otherwise deciding an appeal, likewise, it is also very clear that Congress intended for any one-judge order to be reviewed by a three-judge panel. And although Congress has generally delegated to the judiciary the power to make rules governing judicial practice and procedure, the final authority for rulemaking rests ultimately with Congress. **Hanna v. Plumer**, 386 U.S. 460, 14 L.Ed.2d 8 (1965); **Sibbach v. Wilson & Co.**, 312 U.S. 1, 85 L.Ed. 479 (1941).

Additionally, it was also well-established on September 10, 2001, within the Seventh Circuit and elsewhere that Rule 27(c) prohibited a single circuit court from dismissing an appeal. **N.L.R.B. v. Brooke Industries Inc.**, 873 F.2d 165, 166 (7th Cir. 1989); See also, **In Re Martin Trigona**, 9 F.3d 226 (2nd Cir. 1993). And it was also well-established on September 10, 2001, that "the action of a single judge may be reviewed by the court." **Locke v. Allstate Ins. Co.**, 696 F.2d 1340 (11th Cir. 1983); See also, **Franklin v. Hightower,** 215 F.3d 1196 (11th Cir. 2000), which held a one-judge order may be reviewed by a full panel.

Therefore, Judge Bauer knew, or should have known, he was prohibited by Fed.R.App P. 27(c), from entering a one-judge order to dismiss Petitioner's direct criminal appeal.

(See copy of the order included in Appendix G, at App. 22). Likewise, Judge Bauer knew, or should have known Petitioner had a right under Fed.R.App.P. 27(c), to petition a three judge panel to review his order dismissing Petitioner's appeal. However, Judge Bauer deprived Petitioner out of this right, by recharacterizing a properly styled petition under Fed.R.App.P. 40, into a motion for reconsideration, that Judge Bauer denied on November 13, 2001. (See copy of the order in Appendix H, at App. 23). Because, Judge Bauer knew, or should have known that he was prohibited by Fed.R.App.P. 35(a) and 28 U.S.C. § 46(c) from participating in the decision making process to rehear a matter en banc, because, he reached the status of becoming a senior circuit court judge.

Nonetheless, to prevent a three-judge panel from reviewing his unlawful one-judge order dismissing the Petitioner's criminal appeal on September 10, 2001. Judge Bauer violated the law and this Court's holdings in **United States v. American-Foreign S.S. Corp.**, 363 U.S. 685, 4 L.Ed.2d 1491 (1960). In that case, a retired circuit court judge participated in an en banc decision of a circuit court. This Court held, that the relevant statute did not authorize retired circuit judges to participate in such a proceeding. Id. 686, 691 80 S.Ct 1336. Because, "under existing legislation a retired judge is without power to participate in an en banc Court of Appeals determination." Id. at 691 80 S.Ct. 1336. In this case Judge Bauer unlawfully prevented a three-judge panel of the Seventh Circuit from reviewing his unlawful one-judge order dismissing Petitioner's direct criminal appeal.

This Court in **Mirales V. Waco,** 502 U.S. 9, 116 L.Ed.2d 9 (1991), made it very clear that absolute judicial immunity may be overcome only when the following two sets of circumstances exist:

> "First, a judge is not immune from liability, for non-judicial actions, ie., actions not taken in the judge's judicial capacity. **Forrester v. White,** 484 U.S. at 227-229, 98 L.Ed.2d 555, 108,S.Ct. 538; **Stump v. Sparkman,** 435 U.S. at 360, 55 L.Ed. 331, 98 S.Ct. 10 99, (502 U.S.12]. Second, a judge is not immune for actions though judicial in nature, taken in the complete absence of jurisdiction. Id. at 356-57, 55 L.E 2d 331, 98 S.Ct. 1099; **Bradley v. Fisher,** 13 Wall, at 351, 20 L.Ed. 646".

Id. 116 L.Ed.2d at 14. Accordingly, Judge Bauer would not be entitled to immunity for his actions in dismissing Petitioner's appeal because, Fed.R.App.P. 27(c), prohibited him from entering a one-judge order dismissing Petitioner's direct criminal appeal.

Likewise, Judge Bauer is not entitled to immunity for his actions in preventing a three-judge panel from reviewing his unlawful one-judge order which dismissed the Petitioner's appeal, because, Fed.R.App.P. 35(a), and 28 U.S.C. § 46(c), prohibited him from ruling upon a properly styled Rule 40 petition for rehearing.

Additionally, this Court's decision in **Nguyen v. United States,** 539 U.S. 69, 156 L. Ed.2d 64, (2003), also supports Petitioner's contentions Judge Bauer is not entitled to absolute immunity because he acted in total absence of jurisdiction when he entered the one-judge order dismissing Petitioner's appeal. In **Nguyen**, this Court vacated a decision by the Ninth Circuit that was rendered by a panel consisting of two Article III judges and the Chief Judge of an Article IV territorial court. This Court held that Congress had not

authorized Article IV judges to serve on courts of appeals. And, also held that the Chief Judge of the District for the Marianna Islands should not have been permitted on the Ninth Circuit panel, because, "the statutory authority for courts of appeals to sit in panels, 28 U.S.C. § 46(b) [28 USCS § 46(b)], requires the inclusion of at least three Article III judges in the first instance." Id. **Nguyen**, 156 L.Ed.2d at 79. Moreover, the majority Justices in responding to the dissenting Justices specifically noted:

> "Unlike the dissent, we believe that it would "flou[t] the stated will of Congress." post, at ---, 156 L.Ed.2d, at 80 (opinion of Rehnquist, C.J.), and call into serious question the integrity as well as the public reputation of judicial proceedings to permit the decisions below to stand, for no one other than a properly constituted panel of Article III judges was empowered to exercise appellate jurisdiction in these cases."

Id. 156 L.Ed.2d at 79, n. 17. Nevertheless the Eleventh Circuit's opinion suggests the Eleventh Circuit has interpreted **Nguyen** as an exercise of this Court's supervisory powers to correct a statutory violation by the Ninth Circuit and not because the Court considered the issue presented in **Nguyen**, as being jurisdictional. (See Appx. 20, at n.3).

It is well-established that a judge is not entitled to immunity when he performs judicial act in complete absence of jurisdiction. Id. **Bradley**, 80 U.S. at 352, 13 Wall 355. The underlying facts in this case show that Judge Bauer had performed judicial acts that he was statutorily prohibited to do in causing Petitioner to be deprived out of his constitutional

rights. Therefore, Judge Bauer is not entitled to judicial immunity and the Eleventh Circuit's decision should be reversed by this Court.

2.

The Eleventh Circuit holding employees of the Clerk's Office for the Seventh Circuit Court of Appeals are entitled to absolute immunity for their actions in refusing to file a petition challenging the unlawful actions of Judge Bauer is inconsistent with this Court's holdings pronounced in Antione v. Byers & Anderson, Inc., 508 U.S. 429, 124 L.Ed.2d 391, (1993).

This Court has instructed the lower courts that a functional approach should be taken in determining whether an individual is entitled to absolute immunity. See **Forrester v. White**, 484 U.S. 21, 98 L.Ed. 2d 55, (1988); **Cleavinger v. Saxner**, 474 U.S. 193, 88 L.Ed.2d 507, (1985). Whether absolute immunity ought to be offered is dependent upon the nature of the functions performed by the officer in question and "the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." Id. **Forrester**, 484 U.S. at 225.

More recently, this Court explained in **Antione v. Byers & Anderson, Inc.**, 508 U.S. 429, 124 L.Ed.2d 391, (1993), that "[w]hen judicial immunity is extended to officials other than judges, it is because their judgments are 'functional[ly] comparab[le] to those of judges -- that is, because they too, 'exercise a discretionary judgment' a part of their functions." Id. **Antione**, 50) U.S. at 436, 113 S.Ct. 2167

(quoting) **Imbler v. Pachtman**, 424 U.S. 409, 47 L.Ed.2d 128, (1976). However, absolute immunity does not extend to all positions simply, "because they are part of the judicial function." Id. **Imbler**, at 435, 96 S.Ct. 984 (internal quotation marks and citations omitted).

Petitioner alleged throughout ¶-75, of his complaint that employees of the Clerk's Office of the Court of Appeals for the 7th Circuit aided and abetted Judge Bauer in depriving Petitioner of his constitutional rights by failing to distribute copies of a properly styled Rule 40 petition for re-rehearing, to the active judges of the 7th Circuit as required under Rule IOP-5 ¶ (h) of the Internal Operating Procedures of the United States Court of Appeals for the 7th Circuit. (Compl. ¶-75). Thereby, preventing a three-judge panel from reviewing Judge Bauer's unlawful one-judge order dismissing Petitioner's direct criminal appeal. (See Appx. 23). Additionally, as shown by the documents included in the Appendix of this Petition at Appx. 24, 25, 26 and 27, these defendants also refused to file a second petition challenging Judge Bauer's actions in sua sponte recharacterizing a Rule 40 Petition For Rehearing into a Motion For Reconsideration which Judge Bauer denied on November 13, 2001. (See Appx. at 23). Therefore, the Complaint alleged that the failure of these employees to accept the Petitioner's motions for filing and their failure to distribute Petitioner's motions as they were required to do pursuant to the Internal Operating Rules of Procedure for the Seventh Circuit Court of Appeals, had caused Petitioner to be denied his right under the First Amendment of access to the courts. In short, these defendants were charged with breaching their duties to perform the ministerial act of accepting technically sufficient papers for filing and distribution to the court.

Almost one-hundred and fifty-years ago, this Court held that a "ministerial duty....is one in respect to which nothing is left to discretion. It is a simple definite duty, arising under conditions admitted or proved to exist, and imposed by law." (See **Mississippi v. Johnson**, 4 Wall. 475, 71 U. S. 475, 18 L.Ed. 437 (1866). Additionally this Court in **Antione v. Byers & Anderson, Inc.**, 504 U.S. 429. 124 L.Ed.2d 391 (1993) held that court reporters exercising their duties only enjoy qualified immunity wrote;

> "We have consistently emphasized that the official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question. The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. We have been sparing in our recognition of absolute immunity and have refused to extend it any further than its justification would war rant." **Burns v. Reed**, 500 U.S. 478, 486-487, 114 L.Ed.2d, 111 S.Ct. 1934, (1991)...."

Id. **Antione**, 124 L.Ed.2d at 397, n.4. In making a determination of whether a government official is absolutely immune from suit a court must "undertaker a considered inquiry into the immunity historically accorded the relevant official at common law and the interest behind it." Id. 508 U.S. at 432-433, 113 S.Ct. at 2169-2170, (quoting **Butz V. Economou**, 438 U.S. 478. 57 L.Ed.2d 895, (1975).

Moreover even before, **Antione**, supra, was decided, the Seventh Circuit decided the issue of what type of immunity court clerks are entitled to for the functions

they perform. In **Lowe v. Letsinger**, 772 308 (7th Cir. 1985), the 7th Circuit held that absolute immunity did not apply to a clerk's involvement in the concealment of the entry of a post-conviction order "because the clerk's duty to type and send the notice after entry of judgment is a non-discretionary, ministerial task." Id.

Similarly, the issue of what type of immunity court clerks are entitled to for the function they perform had already been decided in the Eleventh Circuit based upon the Eleventh Circuit in **Bonner v. City of Prichard**, 661 F.2d 1206 (11th Cir. 1981), adopting as binding precedent all of the prior decision of the old Fifth Circuit. In **Williams v. Wood**, 612 F.2d 982 (5th Cir. 1980), the old Fifth Circuit held that a clerk of a federal court performing routine duties such as entering orders and notifying parties does not enjoy absolute immunity.

Nevertheless, the Eleventh Circuit in affirming the district court's decision to deny Petitioner 60(b) relief to reinstate, the complaint against Judge Bauer and the unknown employees of the Clerk's office of the U.S. Court of Appeals for the Seventh Circuit failed to even mention this Court's holdings in their unpublished opinion. Instead, the reviewing panel applied the law of the case doctrine and wrote:

> "We expressly decided that the judicial defendants were entitled to absolute immunity and that the unnamed employees of the clerk's office were "quasi-judicial" defendants entitled to immunity. This included Judge Bauer and the clerk's office employees for the U.S. Court of Appeals for the Seventh Circuit. No exception to the law of the case

> rule applies; there has been no subsequent trial, no contrary controlling authority has since been decided and Appellant has not shown that the prior decision was clearly erroneous and would work a manifest injustice." (See Appx. at 20).

Petitioner submits, that this Court's holdings in **Antione**, supra, shows that the Eleventh Circuit ruling that the employees of the Clerk's office are "quasi-judicial" defendants who are entitled to absolute immunity is clearly erroneous, and should be reversed by this Court.

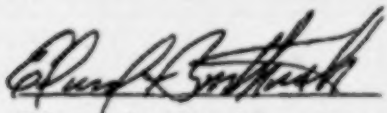
CONCLUSION

Petitioner has shown this Court that Judge Bauer acted unlawfully when he dismissed Petitioner's appeal, because he was prohibited by Rule 27(c) of the Federal Rules of Appellate Procedure from entering a one-judge order to dismiss the appeal. Therefore, Judge Bauer exercised usurped authority and is not entitled to absolute judicial immunity. **Bradley v. Fisher**, 80 U.S. 335, 13 Wall, 335, 20 L.Ed. (1872). Likewise, Petitioner has shown this Court Judge Bauer unlawfully prevented a three-judge panel from reviewing his unlawful one-judge order by ruling upon a matter he also was prohibited from ruling upon. Therefore, Judge Bauer is also not entitled to absolute judicial immunity for his actions in preventing Petitioner from petitioning a three-judge panel to review Judge Bauer's unlawful one-judge order. Id. **Bradley**, supra.

Finally, Petitioner has also shown this Court that the unknown employees of the Clerk's Office for the Seventh Circuit are not entitled to absolute immunity for their actions in denying Petitioner access to the Courts.

Wherefore, all of the reasons stated in this petition. And for the purpose of protecting the public's confidence in the federal judiciary. This Court should grant certiorari to review the judgment entered by the United States Court of Appeals for the Eleventh Circuit on December 16, 2004, at Docket No. 04-11593-JJ. So that the the public can be assured that this Court will not allow federal judges to violate, or disregard the law with impunity.

Respectfully submitted,



Edward Bontkowski

TABLE OF APPENDICES

A. Order of dismissal of the United States District Court for the Middle District of Florida entered on September 16, 2002.....Appx. 1

B. Unpublished Opinion of the United States Court of Appeals for the Eleventh Circuit decided on May 13, 2003.....Appx. 8

C. Order of the United States Court of Appeals for the Eleventh Circuit denying Petition for Rehearing and Petition for Rehearing En Banc dated August 14, 2003.....Appx. 15

D. Order of the United States District Court for the Middle District of Florida denying Rule 60(b) motion.....Appx. 16

E. Unpublished Opinion of the United States Court of Appeals for the Eleventh Circuit decided on December 16, 2004.....Appx. 17

F. Order of the United States Court of Appeals for the Eleventh Circuit denying Petition for Rehearing and Petition for Rehearing En Banc dated May 3, 2005.....Appx. 21

G. Order dated September 10, 2001. in Appeal No. 00-3218 (7th Cir. 2000), that is part of the record in Appeal No. 04-11593-JJ (11th Cir. 2004).....Appx. 22

H. Order dated November 13, 2001, in Appeal No. 00-3218 (7th Cir. 2000), that is part of the record in Appeal No. 04 -11593-JJ (11th Cir. 2004).....Appx. 31

I. Documents related to Appeal No. 00-3218 (7th Cir. 2000 that have been made part of the record in Appeal No. 04-11593-JJ (11th Cir. 2004).....Appx. 24

.....Appx. 25

.....Appx. 26

.....Appx. 27

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

FILED
2002 SEP 16 PM 2:55
CLERK, US DISTRICT COURT
OCALA FLORIDA

EDWARD BONTKOWSKI,

Plaintiff,

v. Case No. 5:02-cv-259-Oc-10GRJ

RUBEN CASTILLO, et al.,

Defendants.

CERTIFIED A TRUE COPY
SHERYL L. LOESCH, CLERK
U.S. DISTRICT COURT
Deputy Clerk

ORDER OF DISMISSAL

Plaintiff, *a pro se* federal prisoner, initiated this action by filing a Civil Right-Complaint (Doc. 1) on August 28, 2002. In his seventy-four page complaint, Plaintiff sues at least twenty-nine named and unnamed federal defendants, in their official and individual capacities, for allegedly conspiring to deprive Plaintiff of his property rights, privileges and liberty, in violation of the United States Constitution. Plaintiff lists twenty-two different causes of action and six prayers for relief. Plaintiff seeks both monetary damages and injunctive relief against the defendants.

Of the twenty-nine defendants, Plaintiff specifically names twenty-one district court or circuit court judges, and eight employees of the United States Department of Justice. The other Defendants consist of an unknown number of Jane and John Does, who are federal employees in the Clerk's Office of the United States District Court for the Northern District of Illinois, the Clerk's Office of the Seventh Circuit

Court of Appeals, and the United States Bureau of Prisons. Plaintiff sues each Defendant for his or her part in the malicious prosecution and false imprisonment of the Plaintiff.

Standard of Review

Pursuant to the Prison Litigation and Reform Act (PLRA), the Court is required to dismiss case at any time if the Court determines that the allegation of poverty is untrue, or the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief.[1] This standard is generally applied to cases in which the Plaintiff is proceeding *in forma paupens*. "However, even when the pro se plaintiff has paid the filing fee, a district court may dismiss the complaint sua sponte if it is frivolous or includes fantastic and delusional claims."[2]

For the reasons set forth herein, this case is due to be dismissed.

Frivolity

In his Complaint, Plaintiff alleges a fantastical and elaborate conspiracy to establish that the Defendants in this case maliciously prosecuted and falsely imprisoned him. The conspiracy goes from the Federal Agents who investigated the

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1. See 28 U.S.C. §1915(e)(2)(A) and 28 U.S.C. §1915(e)(2)(B)(i)-(iii).

2. ***Cummings v. Giuliani***, 2000 WL 1597686 at o2 (S.D.N.Y. 2000) (citing Pillay v.) NS. 45 F.3d 14. 17 (2d Cir. 1995); ***McAllan v. Malatzky***. 1998 WL 24369-at *6 (S.D.N.Y. Jan. 22, 1998) "*aff'd*, 173 F.3d 845 (2d Cir. 1999); ***Pourzandvakil v. Humphrey***, 1995 WL 316935 at *8; ***Tyler v. Carter***, 151 F.R.D. 537, 540 (S.D.N.Y. 1993) *aff'd*, 41 F.3d 1500 (2d Cir. 1994).

crime, to the attorneys who prosecuted him, and encompasses every District Court Judge, Clerk's office employee and Circuit Court Judge who had any involvement with the handling of his criminal conviction and/or appeals. Further, even after Plaintiff was already incarcerated, unknown employees of the Bureau of Prisons conspired to separate Plaintiff from his legal papers, block his access to legal research and delay the filing of his appellant brief, thereby causing Plaintiff to lose his direct criminal appeal. All in all, there are at least twenty-nine different federal employees, from several different agencies, all working in concert since 1992, to maliciously prosecute Plaintiff and falsely imprison him. Moreover, this conspiracy was furthered by the employees of the Bureau of prisons after Plaintiff was incarcerated, and apparently runs into the unforeseen future since: Plaintiff seeks injunctive relief.

Of the factual claims that are a basis for a frivolity dismissal under § 1915, "are claims describing fantastic or delusional scenarios with which federal district judges are all too familiar."[3] The instant claims can be so classified and Plaintiff should not be allowed to waste judicial time and resources, simply because he paid the $150.00 filing fee. Therefore, this case is due to be dismissed as frivolous.

Immunity

Even if Plaintiff should be allowed to proceed despite, the frivolous nature of his claims, the Defendants in this case would be immune from suit. "Judges are entitled to absolute judicial immunity from damages for those acts taken while

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3. ***Neitzke v. Williams***, 490 U.S. 319, 328 (1989).

they are acting in their judicial capacity unless they acted in the "clear absence of all jurisdiction."[4] "This immunity applies even when the judge's acts" are in error, malicious, or were in excess of his or her jurisdiction." *Id.* Further, defendant federal judges are granted absolute judicial immunity for both monetary and injunctive relief. *Id* at 1242.

When initiating or presenting the government's case against a criminal defendant, prosecutors are also entitled to absolute immunity from damages.[5] This immunity encompasses acts or omissions associated with the judicial process. *Id.* However, prosecutors are not entitled to absolute immunity from injunctive relief.[6] Here, because Plaintiff in this case does not seek injunctive relief against the prosecutorial defendants, absolute immunity would apply.

Government actors performing judicial functions have been found to be shielded by the doctrine of absolute, immunity.[7] This "quasi-Judicial immunity" is recognized when the defendant is performing tasks "intimately associated with the judicial phase of the criminal process." *Id* at 430. The inquiry focuses on the function performed by the official and not his position.[8]

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4. ***Bolin v. Story***, 225 F.3d 1234, 1239 (11th Cir. 2000) (citing ***Stump v. Sparkman***, 435 US. 349, 356-57 (1978)).

5. ***Imbler v. Pachtman***, 424 U.S. 409, 430-31 (1976).

6. **Bolin at** 1242 (citing ***Tarter v. Hury***, 646 F.2d 1010,1012 (5th Cir. 1981)).

7. See generally, ***Imbler v. Pachtman***, *supra*

8. ***Forrester v. White***, 484 U.S. 219, 223-24 (1988); ***Cleavinger v. Saxner***, 474 U.S. 193, 202 (1985).

There is absolutely no doubt that the actions of the Clerk's Office employees at the District Court and the Circuit Court, as described by the Plaintiff in the Complaint, are "quasi-judicial" functions that are entitled to absolute immunity. Moreover, Plaintiff bases those allegations on his constitutional rights to free and equal access to the Courts. It is abundantly clear that Plaintiff has not been denied access to the Courts.

The remaining defendants in this case are the two named Defendants who work for the Federal Bureau of Investigations and the other unknown Jane and John Does who work for the Bureau of Prisons. It is unclear from the facts of the Complaint whether these Defendants would be entitled to absolute or qualified immunity. However, even assuming that immunity does not apply, Plaintiff has failed to state a cause of action against these Defendants.

Failure to state a cause of action

Plaintiff complains that defendants Kacoyannakis and Smith, helped file false criminal charges against Plaintiff, intimidated witnesses and offered perjured testimony to the court to obtain Plaintiffs conviction. In light of the fact that a ruling favorable to Plaintiff with regard to these claims, would undermine the underlying conviction and sentence, these claims are not properly raised in a civil rights complaint and are due to be dismissed from this action.[9]

Plaintiff asserts that the unknown Jane and John Does of the Bureau of Prisons hindered and delayed his ability to research and prepare his appeal brief. Essentially, Plaintiff

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9. See ***Heck v. Humphrey***, 512 U.S. 477 (1994).

states that his *pro se* status and fact of incarceration place him at the mercy of the Bureau of Prison employees in preparing his legal documents. This lack of control causes delays and hinders Plaintiff's ability to adequately represent himself. However, every *pro se* prisoner plaintiff or petitioner is in the same situation as the Plaintiff in this case. Moreover, many of those similarly situated are able to adequately prepare and timely file court documents. Even when they are not, the Courts are generally more than willing to grant extensions of time and other considerations to incarcerated parties. The mere fact that the circumstances of incarceration may hinder or delay Plaintiff's case to some extent, does not rise to the level of a constitutional violation, nor do the specific facts as described by Plaintiff in his Complaint.

Subject matter jurisdiction

Even if Plaintiff's Complaint was not frivolous,, the Defendant's were hot entitled to immunity, and Plaintiff had stated a cause of action, this case would be due to be dismissed for lack of subject matter jurisdiction. Each of the named and unnamed defendants is either a federal judicial officer or federal employee in the state of Illinois. Further, all of the acts complained of were committed in the, state of Illinois. Other than Plaintiffs place of confinement, there is absolutely no nexus between this Court and the events described by Plaintiff. Therefore, even if Plaintiff had otherwise stated a cause of action, this case would have to be dismissed.

Conclusion

For the reasons stated above, this case is **DISMISSED**. The Clerk is directed to enter judgment accordingly and close the file.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 16th day of September 2002.

WM. TERRELL HODGES
United States District Judge

la 9/9
c:
Edward Bontkowski

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
May 13, 2003
THOMAS K. KAHN
CLERK

No. 02-00259
Non-Argument Calendar

EDWARD BONTKOWSKI,

Plaintiff-Appellant,

versus

RUBEN CASTILLO,
ELAINE BUCKLO, et al,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District

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(May 13, 2003)

Before EDMONDSON, Chief Judge, DUBINA and MARCUS, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Edward Bontkowski appeals *pro se* the district court's *sua sponte* dismissal, pursuant to 28 U.S.C. § 1915(e), of his civil action against government officials, presumably filed pursuant to **Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics**. 91 S.Ct. 1999 (1971).[1] No reversible error has been shown; we affirm.

Bontkowski, a federal prisoner, alleged in his complaint that 29 named defendants and other unnamed defendants, in their official and individual capacities, conspired to deprive him of his property, rights, privileges, and liberty, in violation of the Fifth Amendment to the U.S. Constitution. The named defendants included 15 judges in the U.S. Court of Appeals for the Seventh Circuit, 6 judges in the U.S. District Court for the Northern District of Illinois, 2 former U.S. Attorneys and 4 Assistant U.S. Attorneys for the Northern District of Illinois, and 2 special agents with the Federal Bureau of Investigations ("FBI"). The unnamed defendants included employees of the Bureau of Prisons ("BOP") and employees of the clerk's offices, of the U.S. District Court for the Northern District of Illinois and the U.S. Court of Appeals for the Seventh Circuit.

Bontkowski specifically asserted that these defendants conspired to deprive him of his constitutional rights by maliciously prosecuting and falsely imprisoning him for mail

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1. The U.S. Supreme Court made available in **Bivens** a cause of action for monetary damages against federal officials in their individual capacities for a violation of a federal constitutional right; **See Bivens** 91 S.Ct. at 2004-05; see also **Uboh v. Reno**. 141 F.3d 1000, 1002-03 (11th Cir. 1998) (claims of malicious prosecution also cognizable under Bivens).

and wire fraud. As relief, he sought $15 million in damages. He sought an injunction against the judicial defendants, preventing them from considering cases, relating to him. And he sought an order prohibiting the BOP from removing him from his place of incarceration in Florida.

The district court, pursuant to § 1915(e) of the Prison Litigation Reform Act, sua sponte conducted a frivolity review of the complaint and determined that, although Bontkowski had paid the filing fee, his allegations should be dismissed as frivolous. In the alternative, the district court determined that the judicial defendants were entitled to absolute immunity from damages and injunctive relief, the prosecution defendants were entitled to absolute immunity from damages, and the judicial-employee defendants were entitled to absolute immunity because of their "quasi-judicial" function. The district court determined that Bontkowski failed to state a cause of action against the FBI defendants because his-claims, if true, would undermine his conviction and sentence, in violation of **Heck v. Humphrey**. 114 S.Ct. 2364, 2372 (1994). And the district court conceded that no cause of action existed against the BOP employees because Bontkowski failed to allege a constitutional violation.[2]

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2. Although the district court addressed the merits of the complaint, it also concluded that it lacked subject matter jurisdiction because the defendants committed the alleged acts underlying the allegations in Illinois. Because Bontkowski sought relief for constitutional harms allegedly inflicted by federal government officials, the district court had subject matter jurisdiction over the case. **See Bivens**. 91 S.Ct. at 2004-05: **see also** 28 U.S.C. § 1331 (district courts "shall have jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"). But, as explained below, the district court did not err in dismissing the case for failure to state a claim.

As a preliminary matter, Bontkowski contends that the district court erroneously dismissed his complaint pursuant to § 1915(e). A district court may dismiss an **in forma pauperis** ("IFP") complaint for frivolity, failure to state a claim, or when a plaintiff seeks monetary relief against a defendant who is immune from such relief. **See generally** 28 U.S.C. § 1915(e)(2)(B)(i)-(m). And we review for abuse of discretion a district court's decision that an IFP complaint is frivolous under 28 U.S.C. § 1915(e)(2)(B)(i). **Napier v. Preslicka,** 314 F.3d 528, 531 (11th Cir. 2002).

In this case, the district court acknowledged that Bontkowski was not proceeding IFP, but determined that his complaint, nevertheless, should be dismissed because it was frivolous and included "fantastic and delusional claims." But regardless of whether the district court properly dismissed the complaint under § 1915(e), it had authority under 28 U.S.C. § 1915A(a) to review **sua sponte** Bontkowski's complaint against government officials. **See Fisherman Against the Destruction of the Environment, Inc. v. Closter Farms, Inc.** 300 F.3d 1294, 1296-97 (11th Cir. 2002) (may affirm district court "on any adequate ground, even if it is other than the one on which the court actually relied").

Pursuant to § 1915A, district courts shall review as soon as practicable a complaint in a civil action in which a prisoner seeks redress from "a governmental entity or officer or employee of a governmental entity." 28 U.S.C. § 1915A(a). On review, a district court must dismiss a complaint where the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted" or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915A(b). We review *de novo* a district court's *sua sponte* dismissal for failure to state a claim under § 1915A(b)(l). **Leal v. Georgia Dept. of Corrections.** 254 F.3d 1276,1279 (11th Cir. 2001).

To recover damages for an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed or direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. **See Heck**. 114 S.Ct. at 23:72. On the other hand, this mandatory showing is not applicable if the district court determines that "the plaintiffs action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff," see Id. at 2372-73, or if a prisoner is seeking prospective relief that will not "necessarily imply" the invalidity of the conviction or sentence, see **Edwards v. Balisok**. 117 S.Ct. 1584,1589 (1997). And although Heck involved an action filed pursuant to 42 U.S.C. § 1983, we have concluded that its principles are equally applicable to claims brought pursuant to Bivens. **See Abella v. Rubino**, 63 F.3d 1063,1064 (11th Cir. 1995).

Here, Bontkowski alleged in his complaint that the defendants violated his constitutional rights by conspiring to maliciously prosecute and falsely imprison him in retaliation for Bontkowski's former accusations against, among other persons, employees of the U.S. Department of Justice. In doing so, he essentially challenged the legality of his conviction. Because he did not show that his conviction had been invalidated, he could not, as a matter of law, recover damages in his case. **See Heck**. 114 S.Ct. at 2372. Similarly, his claims for injunctive relief were properly dismissed because granting such relief would have implied that the defendants conspired against him and,, as such, that his conviction was invalid. **See Edwards**. 117 S.Ct. at 1589. Accordingly, Bontkowski's claims in which he sought

damages and injunctive relief were dismissed properly under § 1915A for failure to state a claim.

Even if we were to conclude that Bontkowski's claims against the judicial and prosecutorial defendants did not imply that his conviction was invalid and, as such, were not barred under **Heck** these defendants were protected by absolute immunity. In determining whether defendants are entitled to absolute immunity, we "accept as true the allegations of the complaint, together with reasonable inferences that may be drawn therefrom." **Long v. Satz**. 181 F.3d 1275,1278 (11th Cir. 1999). And the proponent of a claim of absolute immunity bears the burden of showing that such immunity is justified, **Jones v. Cannon**. 174 F.3d 1271,1282 (11th Cir.1999).

Prosecutors are entitled to absolute immunity for all prosecutorial acts taken while acting as advocates for the government. **Rowe v. City of Fort Lauderdale**. 279 F.3d 1271,1279 (11th Cir. 2002). Although prosecutors are not protected from injunctive relief or to the extent they step outside their prosecutorial roles to investigate, they are protected in initiating and pursuing criminal prosecutions and for all appearances before the court, including examining witnesses and presenting evidence. Id. at 1279-80 (prosecutor entitled to absolute immunity even if he knowingly proffered perjured testimony and fabricated exhibits at trial).

In this case, Bontkowski alleged in his complaint that the prosecutorial defendants deprived him of his right to have charges brought against him within the applicable statute of limitations, withheld exculpatory evidence, and obtained an indictment and caused him to stand trial for a crime he did not commit. Because Bontkowski failed to allege that the prosecutorial defendants acted in a role other than that of a prosecutor and because Bontkowski did not seek injunctive relief from them, they were entitled to absolute immunity. **See id.**

And federal judges are entitled to absolute immunity from both damages and injunctive relief for those acts taken while they are acting in their judicial capacities, unless they acted in the "clear absence of all jurisdiction." **Bolin v. Story**. 225 F.3d 1234, 1239-42 (11th Cir. 2000). This immunity applies even if a judge's acts were in error, malicious, or were in excess of his or her jurisdiction. Id. Similarly, government actors performing judicial functions are protected by absolute immunity when performing tasks "intimately associated with the judicial phase of the criminal process." **Scarborough v. Myles**. 245 F.3d 1299,1305 (11th Cir. 2001). This inquiry into "quasi-judicial" immunity focuses on what function the official performed, not oh his or her identity or status. Id.

Bontkowski asserted that the judicial defendants acted in concert to deprive him of his liberty. But we have concluded that a judge is immune from suit even when a plaintiff alleges that the judge conspired with other persons concerning a Judicial act to be performed. See **Dykes v. Hosemann**. 776 F.2d 942, 946 (11th Cir. 1985) (en banc). And Bontkowski failed to allege that the judicial defendants acted in "clear absence of jurisdiction." **See Bolin**. 225 F.3d at 1239-42. In addition, Bontkowski asserted that the unnamed employees of the clerk's offices sued in his complaint deprived him his liberty by failing to assign his case to disinterested judges, acts "intimately associated with the judicial phase of the criminal process." **See Scarborough**. 245 F.3d at 1305. The judicial and "quasi-judicial" defendants, as such, were immune from damages and injunctive relief.[3]

AFFIRMED.

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3. To the extent Bontkowski also asserted claims against unnamed BOP officials challenging his placement within the prison system, the district court did not err in determining that he failed to state a claim because the BOP officials had complete discretion over where they housed him. **See Rodriguez v. Lamar**. 60 F.3d 745, 749 (11th Cir. 1995) (detained persons are subject to the BQP's complete control, including being subject to summary reassignment to other facilities within the system).

APPENDIX C

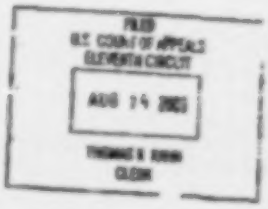
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-154-92-HH

EDWARD BONTKOWSKI,

Plaintiff-Appellant

versus



RUBEN CASTILLO,
ELAINE BUCKLO,
WAYNE ANDERSEN,
CHARLES KOCORAS,
JAMES HOLDERMAN, et al,

Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____ 11th Cir., 19___ F.2D_____)

Before: EDMONDSON, Chief Judge, DUBINA and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

CHIEF JUDGE

ORD-4;
(12/01)

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

FILED

EDWARD BONTKOWSKI,

Plaintiff,

v. Case No. 5:02-cv-259-Oc-10GRJ

RUBEN CASTILLO, et al.,

Defendants.

ORDER

Upon due consideration, Plaintiffs Motion to Vacate Judgment (Doc. 38) is DENIED.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 12th day of January 2004.

WM. TERRELL HODGES
United States District Judge

1/7
c:
Edward Bontkowski

APPENDIX E

[DO NOT PUBLISH]

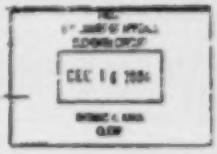
IN THE UNITED. STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No.04-11593 Non-Argument Calendar

D. C. Docket No. 02-00259-CV-OC-10-GRJ

EDWARD BONTKOWSKI,

Plaintiff-Appellant,



versus

RUBEN CASTILLO, ELAINE BUCKLO,
WAYNE ANDERSEN, CHARLES KOCORAS,
JAMES HOLDERMAN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(December 16, 2004)

Before EDMONDSON, Chief Judge, BLACK and BARKETT,
Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Edward Bontkowski, a federal prisoner proceeding pro se appeals the district court's denial of (1) his Fed.R.Civ.P. 60(b) motion to vacate the dismissal of his civil action, filed pursuant to **Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics**. 91 S.Ct. 1999 (1971), and (2) his Fed.R.Civ.P. 59(e) motion challenging the denial of the Rule 60(b) motion. No reversible error has been shown; we affirm.

Appellant alleged in his **Bivens** complaint, in pertinent part, that Judge William Bauer, a Circuit Judge for the U.S. Court of Appeals for the Seventh Circuit, and unnamed employees of the clerk's office for the U.S. Court of Appeals for the Seventh Circuit, were part of a conspiracy[1] to deprive him of his constitutional rights.

We affirmed the district court's dismissal of the action as frivolous. We concluded that federal judges are entitled to absolute judicial immunity, that Appellant failed to allege that the judicial defendants acted in clear absence of jurisdiction, and that the clerk's office employees were "quasi-judicial" defendants entitled to immunity.

After our mandate issued, Appellant filed a Rule 60(b) motion seeking vacatur of the district court's dismissal of his complaint. Citing **Nguyen v. United States**. 123 S.Ct. 2130 (2003), Appellant argued that Judge Bauer illegally decided Appellant's

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1. Appellant sued other judges in the U.S. Court of Appeals for the Seventh Circuit, judges in the U.S: District Court for the Northern District of Illinois, former U.S. Attorneys and Assistant U.S. Attorneys for the Northern District of Illinois, special agents from the FBI, employees of the Bureau of Prisons, and employees of the clerk's offices of the U.S. District Court for the Northern District of Illinois and the U.S. Court of Appeals for the Seventh Circuit.

direct criminal appeal alone.[2] And Appellant argued that Judge Bauer acted illegally by recharacterizing his subsequent petition SOT rehearing as a motion for reconsideration and then by denying the motion. Appellant claimed that Judge Bauer thus acted in the absence of jurisdiction and was not entitled to judicial immunity. Appellant also argued that the clerk's office employees were not entitled to immunity because they aided Judge Bauer and refused to file his petition for rehearing as such. The district court summarily denied Appellant's Rule 60(b) motion.

Appellant filed a Rule 59(e) motion for reconsideration of the denial of the Rule 60(b) motion, reiterating the arguments from his Rule 60(b) motion and further arguing that Fed.R. App.P. 27(c) prevents a single circuit judge from deciding an appeal. The district court summarily denied the Rule 59(e) motion. Appellant now appeals the denials of these motions, reiterating the arguments he presented to the district court.

We review for abuse of discretion the denial of motions filed under Rule 60(b), **Farris v. United States**. 333 F.3d 1211,1216 (11th Cir. 2003), and Rule 59. **Mays v. U.S. Postal Serv.**. 122 F.3d 43,46 (11th Cir. 1997). The district court committed no abuse of discretion in denying Appellant's motions: its ability to provide the relief Appellant requested was proscribed when this Court's mandate issued affirming the dismissal of Appellant's Bivens action. Our opinion became the law of the case, and the district court was required to follow what we "explicitly or by necessary implication decided." **See A.A.Profiles. Inc. v. City of Fort Lauderdale**. 253 FJd 576, 582(11th Cir. 2001).

District of Illinois and the U.S. Court of Appeals for the Seventh Circuit.

2. The record shows that Judge Bauer denied Appellant's "Motion For Leave To File His Brief Instanter And/For Leave To File Oversized Brief." Judge Bauer then noted that Appellant had failed to file timely an opening brief despite many extensions of time and despite a warning that no further extensions would be granted. Judge Bauer then dismissed the appeal for failure to prosecute, under 7th Cir.R. 31(c)(2).

We expressly decided that the judicial defendants were entitled to absolute immunity and that the unnamed employees of the clerk's offices were "quasi-judicial" defendants entitled to immunity. This included Judge Bauer and the clerk's office employees for the U..S. Court of Appeals for the Seventh Circuit. No exception to the law of the case rule applies: there has been no subsequent trial, no contrary controlling authority has since been decided,[3] and Appellant has not shown that the prior decision was clearly erroneous and would work a manifest injustice. **See id.**

AFFIRMED.

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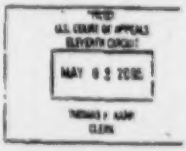
3. Appellant's citation to **Nguyen** does not alter our conclusion. In that case the Supreme Court concluded that it was a violation of the designation statute 28 U.S.C. § 292(a), for a Ninth Circuit panel comprised of two Article III judges and the Circuit Judge of the District Court for the Northern Mariana Islands, who is not an Article Id judge, to decide an appeal. **Nguyen**. 123 S.Ct at 2134-35. The Supreme Court also concluded that the quorum statute, 28 U.S.C. § 46, which allows two judges to constitute a quorum and conduct judicial business, did not save the decision below because (1)that statute did not limit the Court's power to vacate the judgment of an improperly constituted court, and (2)the statute required the inclusion of at least three judges in the first instance. Id. at 2138-39. **Nguyen** does not alter appellate jurisdiction or judicial immunity in the manner Appellant advocates.

APPENDIX F

I'M THE UNITED STATES COURT OF APPEALS
FOR THE.ELEVENTH CIRCUIT

No. 04-11593-CC



EDWARD BONTKOWSKI,
Plaintiff-Appellant,

versus

RUBEN CASTILLO,
ELAINE BUCKLO,
WAYNE ANDERSEN, CHARLES KOCORAS,
JAMES HOLDERMAM, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida

Before: EDMONDSON, Chief Judge, BLACK and BARKETT. Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of thief panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5) the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

CHIEF JUDGE

ORD-42
(6-95)

APPENDIX G

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Date: September 10, 2001
BEFORE: Honorable WILLIAM J. BAUER, Circuit Judge

No. 00-3218

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

EDWARD BONTKOWSKI,
Defendant - Appellant

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 97 CR 295, Elaine E. Bucklo, Judge

The following is before the court: APPELLANT'S MOTION FOR LEAVE TO FILE HIS BRIEF INSTANTER AND/FOR LEAVE TO FILE OVERSIZED BRIEF, filed on September 6, 2001, by the pro se appellant.

IT IS ORDERED that the motion is DENIED. This court has granted the appellant numerous extensions of time to file his opening brief. On June 25, 2001, this court extended the deadline until July 18, 2001, and informed the appellant that no further extensions of time would be granted. This notwithstanding, this court granted one final extension of time until July 30, 2001. The order, however, warned that absolutely no further extensions of time would be granted and that the appeal would be dismissed if appellant failed to file an opening brief by the due date. Appellant failed to timely file an opening brief despite numerous warnings by this court. Appellant's instanter motion is too late. Accordingly, this appeal is DISMISSED for failure to prosecute. See Cir. R. 31 (c) (2). (1061-110393)

APPENDIX H

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 13, 2001

BEFORE:

Honorable WILLIAM J. BAUER, *Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff - Appellee	] Appeal from the United] States District Court for
v.	] the Northern District of] Illinois, Eastern Division
EDWARD BONTKOWSKI, Defendant - Appellant	]] No. 97 CR 295]
	] Elaine E. Bucklo,] Judge

Upon consideration of the MOTION FOR RECONSIDERATION, filed on September 28, 2001, by the pro se appellant.

IT IS ORDERED that the motion is DENIED.

APPENDIX I

Edward Bontkowski
Reg. No. 91635-024
c/o FCC Coleman (Medium)
P.O. Box 1032
Coleman, Florida 33521-1032

November 26, 2001

Clerk of the U.S. Court of Appeals
For the 7th Circuit
United States Courthouse
219 South Dearborn Street
Chicago, Illinois 60604
RE: U.S.A. v. Edward Bontkowski
Appeal No. 00-3218

Certified Mail Article No.
7001-0360-0000-8129-6542

RECEIVED AND
RETURNED UNFILED
DEC 6 - 2001
U. S. COURT OF APPEALS
SEVENTH CIRCUIT

Dear Sir or Madam:

Please find enclosed for filing with your office 30 copies of the PETITION FOR REHEARING OF EDWARD BONTKOWSKI, DEFENDANT/ APPELLANT, WITH EN BANC SUGGESTION, related to the above captioned and numbered appeal. I would appreciate your office causing the required number of copies of the petition to be distributed to each circuit judge who is eligible to participate in making a decision to rehear a case en banc under Rule 35 of the Federal Rules of Appellate Procedure and Rule IOP5-(f) of the Internal Operating Procedures for the 7th Circuit.

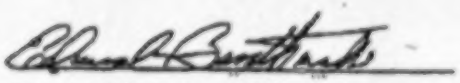
Also, be advised that this is not a motion for reconsideration. One of the 3 issues being raised in the instant petition is whether it was improper for Judge Bauer to recharacterize a properly styled petition for rehearing with en banc suggestion into a motion for reconsideration. I am also asking the Court to decide whether Judge Bauer should have sua sponte recused himself from participating in any decision related to the prior petition for rehearing with en banc suggestion on the grounds that Judge Bauer now is a Senior Judge.

I believe that I am entitled to ask a full panel or the full Court to review the issues which I am presenting in the instant

petition for rehearing with en banc suggestion. I do not believe that your office can reject the instant petition for rehearing with en banc suggestion on the grounds that the instant petition is repetitious under Rule IOP ¶8 of the Internal Operating Procedures for the 7th Circuit.

Finally, I have enclosed a self-addressed stamped envelope and I would appreciate your stamping the extra copy of this correspondence received by your office so that I can be sure that your office has received these petitions for filing.

Respectfully yours,



Edward Bontkowski

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPEAL NO. 00-3218

UNITED STATES OF AMERICA, Plaintiff - Appellee	] Appeal from the United] States District Court for
v.	] the Northern District of] Illinois, Eastern Division
EDWARD BONTKOWSKI, Defendant - Appellant	]] No. 97 CRr 295
	]] Elaine E. Bucklo,] Judge

PETITION FOR REHEARING OF
EDWARD BONTKOWSKI DEFENDANT-APPELLANT
WITH EN BANC SUGGESTION

Edward Bontkowski
Reg. No. 91635-024
c/o FCC Coleman (Medium)
P.O. Box 1032
Coleman, Florida 33521-1032

STATEMENT FOR SUGGESTION OF REHEARING EN BANC

Edward Bontkowski, hereinafter referred to as ("Appellant") submits this Court should allow rehearing en banc to determine if Judge Bauer's recharacterization of the "Petition For Rehearing Of Edward Bontkowski, Defendant-Appellant, With En Banc Suggestion" into a "Motion For Reconsideration" constitutes a significant change of the law in this circuit and to determine if the Federal Rules of Appellate Procedure allows for such recharacterization.

Additionally, this Court should allow rehearing en banc to determine whether a single circuit judge in dismissing a direct criminal appeal significantly changed the law in this circuit arid whether a single circuit judge is precluded from doing so pursuant to 28 U.S.C. § 46(b) and under Rule IOP1 of the Internal Operating Procedures of this Court.

Finally, this Court should allow rehearing en banc to determine if a senior circuit judge who has not been designated by the Chief Judge of this Court to participate in an en banc proceeding under 28 U.S.C. § 294(c) may participate in the decision making process of reviewing and voting upon the en banc suggestion.

STATEMENT OF THEIR CASE

Appellant is presently a federal prisoner serving an 108-month sentence at FCC Coleman, Florida. Appellant filed his opening brief with the Clerk of this Court under the prisoner's mail box rule of **Houston v. Lack,** 487 U.S. 266, 101;L.Ed.2d 210 245, 108 S.Ct. 2379, (1988). On 9/10/01 Judge Bauer dismissed the Instant direct criminal appeal on the grounds the Pro Se Appellant failed to file his opening brief on the due date of 7/30/01. See Exhibit No.(l).